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In The

Supreme Court of the United States

STONERIDGE INVESTMENT PARTNERS, LLC,

Petitioner,

v.

SCIENTIFIC ATLANTA, INC. and MOTOROLA, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICI CURIAE BRIEF OF CHARLES W. ADAMS AND WILLIAM VON GLAHN IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Charles W. Adams is a professor of law at The University of Tulsa College of Law, where he has taught courses in intellectual property law and civil procedure. William von Glahn is an adjunct professor of law who teaches courses in securities regulation and corporate finance. Aside from wishing to assist the Court, our interests in this case are entirely academic.

SUMMARY OF ARGUMENT

This brief supports the Petitioner's position that this Court should recognize claims under § 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)(5) against persons who do not themselves make misrepresentations to the public. In contrast to the arguments that the Petitioner made in its Petition for Certiorari to the effect that the Respondents should be potentially liable as primary violators of § 10(b) and Rule 10(b)(5), this brief urges this Court to recognize that they are secondarily liable, if it can be shown that the Respondents participated in a deceptive practice by giving substantial assistance to a primary violator of § 10(b) and Rule 10(b)(5), and they had actual knowledge that the primary violator was engaging in or intended to engage in fraudulent conduct when they gave assistance to the primary violator.

In *Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994), this Court broadly declared that a private plaintiff

[1] Letters from the attorneys for all parties consenting to the filing of this *amici curiae* brief have been filed with the Clerk.

We are not representing any clients, and the views expressed in this brief are our own. We have no monetary interest in this case.

may not maintain an action for aiding and abetting under § 10(b) against persons who did not engage in the manipulative or deceptive practice. However, it held open the possibility that secondary actors could be liable if all the elements for a primary violation under Rule 10b-5 were satisfied. Since that decision, plaintiffs have struggled to fit their cases into primary liability to avoid the perceived limitation of *Central Bank*. Moreover, secondary actors who knowingly assisted others in perpetrating securities fraud have escaped liability.

Stare decisis requires this Court to follow its decision in *Central Bank* to bar aiding and abetting claims against secondary actors who engage in reckless conduct, but this Court should not extend *Central Bank* to bar secondary liability for securities violations against persons who either induce other persons to violate securities laws or aid and abet other persons to violate securities laws with actual knowledge of the violations. A recognition that § 10(b) authorizes secondary liability for securities violations is consistent with Congressional intent, because it is not reasonable that Congress would have intended that secondary actors who participate in deceptive practices by knowingly assisting others to perpetrate securities fraud should not be liable for the consequences of the securities fraud. The "directly or indirectly" language in § 10(b) supports recognition of secondary liability. This Court's unanimous decision in *MGM Studios, Inc. v. Grokster*, 545 U.S. 913 (2005), finding secondary liability under the copyright law based on common law principles also supports recognition of secondary liability for violations of § 10(b).

ARGUMENT

I. Common Law Principles of Liability for the Conduct of Other Persons

In the classic novel, OLIVER TWIST, Charles Dickens created the villain, Fagin, a reprehensible character who recruited children, including the Artful Dodger and Oliver, for his school for pickpockets. In return for their food and shelter, the children turned over to Fagin the jewelry and other items they stole from the citizenry of nineteenth century London. Certainly Fagin was more blameworthy than the children. After all, he was the adult. Moreover, he was the one who instigated their larcenous activities by teaching them to be pickpockets. Yet Fagin was merely a secondary actor, because he himself did not commit any thefts directly. Rather he induced the children at his school to steal for his benefit.

While there are probably no schools for pickpockets like in Dickens' novel, there are other characters that remind us of Fagin in modern society. This Court dealt with two of them recently in its decision in *MGM Studios, Inc. v. Grokster*, 545 U.S. 913 (2005), where it unanimously ruled that the distributors of peer-to-peer file sharing computer networking software were secondarily liable for the copyright infringement by millions of users of the software. There are also Fagin-like characters in the securities industry.

The common law of torts has developed principles governing the liability of persons for the tortious conduct of other persons that are summarized in the RESTATEMENT (SECOND) OF TORTS §§ 876 and 877. Paragraph (b) of § 876 provides as follows for liability for aiders and abettors:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself . . .

Paragraph (a) of § 877 provides as follows for inducing tortious conduct:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own . . .

These principles are generally straightforward for trial judges and juries to apply. For example, a manufacturer of ammonium nitrate would not be liable as an aider and abettor under § 876(b) to persons who were injured when the ammonium nitrate exploded, unless the manufacturer knew that the purchaser intended to use the ammonium nitrate as an explosive. *Cf. Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613 (10th Cir. 1998) (fertilizer manufacturer was not liable for Oklahoma City bombing). On the other hand, a co-conspirator who supplied ammonium nitrate to a terrorist with knowledge that the terrorist intended to use the ammonium nitrate as a weapon of mass destruction would be liable as an aider and abettor for the injuries that the terrorist caused with the ammonium nitrate. *Cf. United States v. Nichols*, 169 F.3d 1255 (10th Cir. 1999) (affirming conviction of Terry Nichols for conspiring to use weapon of mass destruction and involuntary manslaughter). Similarly, a gun manufacturer would not be liable for injuries caused by its products, *cf.*

Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055 (N.Y. 2001) (gun manufacturer did not owe a duty of reasonable care in the marketing and distribution of handguns to persons killed by its handguns), but a person who supplies a gun to an accomplice knowing that the accomplice intends to use the gun to commit a tort would be liable as an aider and abettor, *cf. Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983) (live-in companion of burglar was liable under § 876(b) for wrongful death of victim killed by the burglar because she provided substantial assistance to the burglar and had actual knowledge of the burglar's illegal activity).

Fagin is a paradigm for inducing tortious conduct under § 877(a), because he did more than provide substantial assistance to the pickpockets; he instigated their larcenous activities. The defendants in *Grokster* are also examples of inducers of tortious conduct. 545 U.S. at 937-38.

Interestingly, the requisite mental states differ for liability for aiding and abetting under § 876(b) and for inducing tortious conduct under § 877(a). Actual knowledge of the tortious conduct is required for aider and abettor liability under § 876(b), but either actual or constructive knowledge suffices for inducing tortious conduct. Actual knowledge is crucial to an aider and abettor's liability, because it provides a basis for the aider and abettor's culpability and prevents persons who unwittingly provide substantial assistance to a tortfeasor from being held liable for the consequences of the tortfeasor's conduct. In contrast, an inducer of tortious conduct is liable under § 877(a) if the inducer either knew or reasonably should have known that the other person's conduct was tortious. By instigating tortious conduct by another person an

inducer becomes liable not only for what the inducer knew would happen but also what the inducer reasonably should have known.

The next section of this brief discusses the application of the common law principles of aider and abetting liability and inducing tort liability in intellectual property law.

II. Application of Common Law Principles in Intellectual Property Law

When Congress passes legislation, it acts against a background of traditional common law rules, and therefore, federal legislation should generally incorporate those rules. The same principle should apply where this Court has implied a private right of action. This principle is exemplified by *Meyer v. Holley*, 537 U.S. 280 (2003), where this Court unanimously held that "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Id.* at 285. The tort law principles of secondary liability have been applied for many years in the intellectual property areas of patent, copyright, and trademark law.

Secondary liability for patent infringement had its genesis in *Wallace v. Holmes*, 29 F. Cas. 74 (C.C.D. Conn. 1871), a case which provides a good illustration of the need for secondary liability in patent law. *Wallace* was concerned with a patent for a lamp consisting of a burner and a glass chimney that was attached to the burner. The defendants manufactured and sold burners that were substantially the same as the burners described in the patent, but the defendants did not directly infringe

the patent, because they did not sell chimneys with the burners. Instead, the purchasers of the burners directly infringed the patent when they attached chimneys that they had purchased separately to the defendant's burners. Although there was then no statutory basis for secondary liability for patent infringement, the *Wallace* court held that the defendants were liable because they acted in actual concert with the makers of the chimneys to cause infringement of the patent. Over the years after the *Wallace* case, the doctrines of contributory infringement and inducing infringement of patents developed until they were codified as paragraphs (b) and (c) of 35 U.S.C. § 271 by the Patent Act of 1952. The Senate Report accompanying the adoption of § 271 confirms the common law origins of contributory infringement in patent law:

> Paragraphs (b), (c), and (d) relate to the subject referred to as contributory infringement. The doctrine of contributory infringement has been part of our law for about 80 years. . . . Considerable doubt and confusion as to the scope of contributory infringement has resulted from a number of decisions of the courts in recent years. The purpose of this section is to codify in statutory form principles of contributory infringement and at the same time eliminate this doubt and confusion.

S. Rep. No. 82-1979, at 8 (1952), *reprinted in* 1952 U.S.C.C.A.N. 2394, 2402. For further discussion of the historical background of contributory infringement and the enactment of 35 U.S.C. § 271, see 5 DONALD S. CHISUM, CHISUM ON PATENTS, § 17.02 [1]-[6] (2004); Charles W. Adams, *A Brief History of Indirect Liability for Patent Infringement*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 369 (2006); Giles S. Rich, *Infringement Under Section*

271 of the Patent Act of 1952, 21 GEO. WASH. L. REV. 521 (1953).

This Court recently recognized secondary liability in copyright law in *MGM Studios, Inc. v. Grokster*, 545 U.S. 913 (2005), holding that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." *Id.* at 919. This Court explicitly noted in *Grokster* that secondary liability in copyright was based on the common law: "Although '[t]he Copyright Act does not expressly render anyone liable for infringement committed by another,' these doctrines of secondary liability emerged from common law principles and are well established in the law. . . ." [Citations omitted]. This Court had previously decided in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), that Sony was not secondarily liable for copyright infringement by purchasers of the VCR's Sony manufactured on account of its "constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material," *id.* at 439, because the VCR's were capable of substantial noninfringing uses, *id.* at 442. The Court of Appeals in *Grokster* ruled that the *Sony* decision precluded secondary liability of the *Grokster* defendants because like Sony's VCR's, the peer-to-peer file sharing software the *Grokster* defendants distributed had substantial noninfringing uses. 545 U.S. at 934. This Court reversed on the ground that *Sony* "was never meant to foreclose rules of fault-based liability derived from the common law." *Id.* at 934-35. It pointed out that:

> [A]t common law a copyright or patent defendant who 'not only expected but invoked [infringing

> use] by advertisement' was liable for infringement 'on principles recognized in every part of the law.' [Citations omitted].
>
> The rule on inducement of infringement as developed in the early cases is not different today.

Id. at 935-36. This Court continued with an analysis of the evidence presented of the defendants' intent to induce infringement, which included their positioning themselves to satisfy the demand for copyright infringement by former Napster users, their failure to develop filtering tools to avoid infringement by their users, and their business model of selling advertising that benefited from high volumes of infringing activity by their users. *Id.* at 939-40. This Court concluded: "The unlawful objective is unmistakable." *Id.* at 940.

While this Court did not refer to RESTATEMENT (SECOND) OF TORTS §§ 876, 877 in either the *Sony* or *Grokster* decisions, its conclusions are completely in line with them. Sony could not be liable under § 876(b) as an aider and abettor on the basis of its having constructive knowledge of copyright infringement by its customers. Instead, actual knowledge that particular customers would use the VCR's to infringe was required as long as the VCR's were capable of substantial noninfringing uses. If the VCR's had no substantial noninfringing uses, however, Sony's actual knowledge of infringing uses might reasonably have been inferred and Sony might have been held liable as an aider and abettor under RESTATEMENT (SECOND) OF TORTS § 876(b). In contrast, the *Grokster* defendants could be liable under § 877(a) based on their intent to induce the users of their software to engage in copyright infringement.

A comparison of the results in *Sony* and *Grokster* shows that it is feasible for courts to decide issues of secondary liability on the basis of the culpability of the parties. Despite the complexity of the technology involved in the cases, it was apparent that the *Grokster* defendants were modern-day Fagins, while Sony was not.

Finally, this Court has recognized secondary liability for trademark infringement despite the lack of statutory authority for it. In *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982), this Court held:

> [L]iability for trademark infringement can extend beyond those who actually mislabel goods with the mark of another. . . . Thus, if a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorially responsible for any harm done as a result of the deceit.

Id. at 930-31.

Since secondary liability has been imposed in patent, copyright, and trademark law on the basis of common law tort principles in the absence of express statutory authority, surely these common law principles should be recognized in securities law, because all of these statutory schemes were enacted against a common law legal background. The next section of this brief discusses how the common law principles from the RESTATEMENT (SECOND) OF TORTS §§ 876, 877 should be applied in securities law.

III. Application of Common Law Principles to Securities Law

Section 10(b) makes it "unlawful for any person, *directly or indirectly*," (emphasis added) to use any manipulative or deceptive device in connection with the sale of registered securities. The use of the "directly or indirectly" language signifies a Congressional intent to extend liability for § 10(b) violations beyond primary violators to Fagin-like characters who do not violate § 10(b) directly by making false statements themselves, but instead violate § 10(b) indirectly by either inducing or aiding and abetting others to commit § 10(b) violations. As the preceding section of this brief pointed out, this Court has consistently upheld the use of secondary liability in patent (before its codification in 1952), copyright, and trademark cases for many years, even though there was no provision in the statutes in these areas for secondary liability. The presence of the "directly or indirectly" language in § 10(b) provides even more reason to recognize secondary liability for § 10(b) violations under the common law principles set out in the RESTATEMENT (SECOND) OF TORTS §§ 876, 877.

This Court stated broadly in *Central Bank v. First Interstate Bank*, 511 U.S. 164, 191 (1994) that: "Because the text of § 10(b) does not prohibit aiding and abetting, we hold that a private plaintiff may not maintain an aiding and abetting suit under § 10(b)." This broad language was not necessary for the decision in *Central Bank*, which involved an aiding and abetting claim against a party who was alleged to have been reckless, but who neither had actual knowledge of the § 10(b) violation nor provided substantial assistance to the primary violator. Consequently, this Court's statement should not foreclose consideration of whether aiding and abetting for a § 10(b)

violation should be recognized for the different circumstances in this case. Last year this Court held in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), that "we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated." *Id.* at 363. Quoting Chief Justice Marshall from *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), this Court reasoned: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Id.* at 399. The facts in *Central Bank* did not present the issues that are involved in this case, and therefore, *Central Bank* is not controlling.

Central Bank was an indenture trustee who was responsible for seeing that the covenants in two public bond issues, one in 1986 and the other in 1988, were satisfied. Among the bond covenants was a requirement for the land securing the bonds to be worth at least 160% of the bonds' outstanding principal and interest and for the property developer to provide Central Bank with an annual report showing that the 160% test had been met. In early 1988, the property developer sent Central Bank an updated appraisal for the land securing both the 1986 bonds and the bonds still to be issued in 1988. While the 1988 appraisal showed land values to be almost unchanged from the 1986 appraisal, Central Bank also received a letter from the senior underwriter that expressed concern that the 160% test was no longer satisfied. Unfortunately, by the time Central Bank had retained an outside appraiser and the outside appraiser had conducted

an independent review of the land values, the 1988 bonds had been issued and the bonds were in default.

Purchasers of the 1988 bonds then sued various defendants under § 10(b), including Central Bank, claiming that Central Bank was secondarily liable for aiding and abetting the fraud in connection with the sale of the bonds. The trial court granted summary judgment for Central Bank, but the Tenth Circuit reversed on the grounds that there were material issues of fact concerning 1) whether Central Bank provided substantial assistance to the fraud by delaying the independent review of the appraisal until after the default on the bonds, and 2) whether Central Bank was reckless, because it knew that the sale of the bonds was imminent and that purchasers were relying on the 1988 appraisal to evaluate the collateral for the bonds. 511 U.S. at 168-69.

This Court reversed the Tenth Circuit, ruling that summary judgment for Central Bank was proper on the expansive ground that aiding and abetting actions are not allowed under § 10(b). It was not necessary for this Court to have gone this far, however, because this Court should have decided the case on a narrower ground – that the requirements for aiding and abetting liability in RESTATEMENT (SECOND) OF TORTS § 876(b) were not satisfied under the facts in *Central Bank*.

The elements required for aider and abettor liability under § 876(b) are that Central Bank must have provided substantial assistance to the § 10(b) violation and that Central Bank must have had actual knowledge of the § 10(b) violation when it provided the substantial assistance to the primary violator. Central Bank may have been lazy, sloppy, and incompetent; it may have moved too

slowly and may not have been diligent; and it may have been negligent or even reckless. There was no evidence that Central Bank had actual knowledge of a 10(b) violation, however, since it was not shown that Central Bank knew that the property developer's appraisal was not correct, and therefore Central Bank could not have known that the sale of the bonds would be based on an inflated out of date appraisal. Moreover, there was no evidence that Central Bank provided substantial assistance to the § 10(b) violation by failing to determine that the appraisal was incorrect before the issuance of the 1988 bonds. Substantial assistance generally requires some affirmative action, and therefore, Central Bank's failure to uncover the inaccuracy in the appraisal should not have given rise to aider and abettor liability. *See* Robert A. Prentice, *Locating That "Indistinct" and "Virtually Nonexistent" Line Between Primary and Secondary Liability Under Section 10(b)*, 75 N. CAR. L. REV. 691, 761 (1997) ("Before *Central Bank*, most courts held that mere silence or inaction could not give rise to even aiding and abetting liability, not to mention primary liability.").

Accordingly, there was no genuine issue of material fact with respect to Central Bank's secondary liability for aiding and abetting a primary § 10(b) violation by the property developer that provided the appraisal to Central Bank. Rather than rejecting secondary liability for aiding and abetting in all § 10(b) cases, this Court should have applied the common law requirements for secondary liability that an aider and abettor must have provided substantial assistance to a § 10(b) violation while having actual knowledge that it was participating in a scheme in which each of the elements for § 10(b) liability were satisfied.

The conduct of Central Bank was qualitatively different than the conduct of the defendants alleged in this case. The plaintiffs have alleged that Charter Communications, Inc. ("Charter") asked the defendants to "enter into a scheme with it which would falsely inflate Charter's publicly reported year-end revenue and operating cash flow in order to artificially inflate Charter's stock price." Petition for a Writ of Certiorari 4. The scheme entailed paying the defendants an additional $20 for each set-top box that Charter purchased from them, but this amount would be recouped from the defendants by their purchasing an equivalent dollar amount of advertising from Charter. Charter would then treat the $20 it "paid" for each set-top box as a capital expenditure, while booking the $20 it "received" from the defendants for advertising as revenue, thereby increasing both the revenue and operating cash flow that Charter publicly reported. In contrast to Central Bank, which merely failed to discover that the primary violator's appraisal was inflated, the defendants in this case are alleged to have actively provided substantial assistance to Charter's § 10(b) violation by amending contracts involving the sale of hundreds of thousands of their products and entering into advertising contracts for millions of dollars to offset the revenue from the sales contract, knowing their purpose was to misstate Charter's revenues and operating cash flow in its financial statement. The plaintiffs have alleged that the defendants went so far as to agree to back date documents to give the false impression to outside auditors and others that the contracts for the sales of the set-top boxes were unrelated to the advertising contracts. *Id.* at 6, 7. If the outside auditors had known that these transactions were interrelated, they would not have permitted Charter to utilize the accounting treatment that charter used in its financial

statements. The attempt by the defendants to cover up the transactions demonstrates that the defendants had actual knowledge of the wrongful purpose for the transactions, which was to inflate the revenue and operating cash flow that Charter publicly reported.

Accordingly, this case presents dramatically different facts from those in *Central Bank*, and the *Central Bank* decision should not stand in the way of this Court's recognition of common law principles of secondary liability with respect to securities law violations. The common law principles of secondary liability are carefully calibrated to provide redress against culpable persons who cause harm to others indirectly through intermediaries, while at the same time protecting innocent bystanders from being exposed to frivolous claims. Under RESTATEMENT (SECOND) OF TORTS § 876(b), secondary liability for aiding and abetting is restricted to persons who both provide substantial assistance to tortious conduct and have actual knowledge of the tortious conduct. Actors such as the accountants in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), who conducted an audit of a brokerage firm but failed to uncover securities fraud, could not be liable as aiders and abettors, because they could not possibly have had knowledge of fraud that they failed to uncover. Even actors who have actual knowledge of securities law violations would not be subject to secondary liability under the common law principles, unless they provided substantial assistance to the securities law violations. Mere inaction or silence, even with knowledge of wrongful activities, would not subject a person to secondary liability under RESTATEMENT (SECOND) OF TORTS § 876(b). Thus, the corporation in *Brennan v. Midwestern United Life Ins. Co.*, 259 F. Supp. 673 (N.D. Ind. 1966), should not have been subject to secondary liability for failing to report the § 10(b) violations of its

brokerage firm, because there was no evidence that the corporation acted in any affirmative way to provide substantial assistance to the § 10(b) violations.

There are a variety of circumstances in which secondary actors might be liable for securities violations if the Court applied the common law principles in the RESTATEMENT (SECOND) OF TORTS §§ 876, 877. A secondary actor who comes up with a deceptive scheme and then persuades another person to carry it out would be liable for inducing a securities violation under RESTATEMENT (SECOND) OF TORTS § 877(a). For example, an investment banker might develop a deceptive scheme and encourage its clients to use the deceptive scheme to misstate their earnings. Alternatively, a secondary actor might conspire with another person to pursue a deceptive scheme and be liable for acting in concert to commit a securities violation under RESTATEMENT (SECOND) OF TORTS § 876(a). Finally, as in this case, a secondary actor who did not originate a deceptive scheme on its own, but instead provided substantial assistance to another person to carry out the deceptive scheme with the awareness that the other person was using the secondary actor's assistance to commit a securities violation, would be liable under RESTATEMENT (SECOND) OF TORTS § 876(b). None of these scenarios was addressed by the *Central Bank* decision, and it is unlikely that Congress would have intended to shield all of these secondary actors from liability for securities law violations, when they would clearly be liable under the common law principles summarized in the RESTATEMENT (SECOND) OF TORTS.

The lack of an express provision in the Private Securities Litigation Reform Act of 1995 for private aiding and abetting actions should not prevent this Court from

recognizing common law principles in a narrow range of cases to provide redress to victims of securities fraud against secondary actors who either induce § 10(b) violations or provide substantial and knowing assistance to primary § 10(b) violators. The 1995 Legislative History states that the Banking, Housing, and Urban Affairs Committee believed that providing explicitly for private aiding and abetting actions would be contrary to the legislation's goal of reducing meritless securities litigation. S. Rep. No. 104-98, at 19, *reprinted in* 1995 U.S.C.C.A.N. 679, 698. Neither the 1934 nor the 1995 Congresses could have intended, however, for all secondary actors to be shielded from liability, even if they induced others to commit § 10(b) violations, conspired with primary violators, or aided and abetted primary violators by providing substantial assistance while having actual knowledge of the primary violations. Congress also could not have intended that lawyers should be able to advise clients that as long as they do not engage in deceptive practices themselves, they will be immune from liability under the securities laws.

CONCLUSION

The plaintiffs have alleged that the defendants provided substantial assistance to Charter's scheme to misstate Charter's operating income and revenue in order to inflate Charter's stock price. This substantial assistance involved the defendants entering into offsetting agreements with Charter that increased the price of set-top boxes that Charter purchased from the defendants in return for advertising for the defendants. The defendants benefited from free advertising from Charter, while Charter

used these transactions to commit a § 10(b) violation by misrepresenting its operating income and revenue in its financial statements. In order to cover up the relationship between the offsetting agreements, the defendants agreed to back date them. The cover up makes evident the defendants' actual knowledge of the unlawful purpose of the offsetting agreements. Accordingly, the plaintiffs have satisfied the requirements for alleging a claim for the defendants to be secondarily liable as aiders and abettors of Charter's § 10(b) violation. Despite the broad language in *Central Bank* concerning aider and abettor liability, this Court should recognize secondary liability for aiding and abetting a § 10(b) violation under the facts of this case, because Congress could not have intended that the defendants would escape liability for their actions.

Respectfully submitted,

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